

Title IX of the Education Amendments of 1972 – 2022 Notice of Proposed Rulemaking



Sex Discrimination Prohibition, Including Based on Sexual Orientation, Gender Identity, and Sex Characteristics

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On June 23, 2022, the fiftieth anniversary of the enactment of Title IX, the U.S. Department of Education (ED) released the unofficial text version of the new Notice of Proposed Rulemaking (NPRM) for the Title IX Regulations. The official text of the 2022 Title IX Regulations were published on July 12, 2022. ED allows for a comment period on the new regulations that lasts 60 days—until September 12, 2022. The Department proposed these new regulations in an effort to better align the regulations with Title IX’s nondiscrimination mandate and to guarantee an educational environment free from sex-based discrimination. The new regulations also clarify the scope and application of Title IX and the obligations of postsecondary institutions acting in compliance with Title IX.

Title IX prohibits discrimination on the basis of sex. In the past, ED has narrowly interpreted the scope of this prohibition, stating that Title IX does not fully encompass discrimination on the basis of sexual orientation or gender identity. After the U.S. Supreme Court’s decision in *Bostock v. Clayton County, Ga.*, ED acknowledged that Title IX covered sexual orientation and gender identity, but only so far as the discrimination impermissibly takes “biological” sex into account.

This proposed regulation clarifies the broader scope of Title IX and all of the prohibited forms of sex discrimination, including discrimination based on sexual orientation, gender identity, and sex characteristics. Furthermore, it provides additional clarification regarding the limited areas where Title IX permits recipients to discriminate on the basis of sex. The text found in the 2022 NPRM is outlined below.

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2022 NPRM Proposed Sections/Topics	Current 2020 Regulations
<p>§ 106.10 Scope</p> <ul style="list-style-type: none"> • Proposed § 106.10 would clarify that Title IX prohibits all forms of sex discrimination, including discrimination based on: <ul style="list-style-type: none"> ○ Sex stereotypes, ○ Sex characteristics, ○ Pregnancy or related conditions, ○ Sexual orientation, and ○ Gender identity. 	<p>None</p>
<p>§ 106.31(a)(2)</p> <ul style="list-style-type: none"> • Proposed new § 106.31(a)(2) would clarify that in the limited circumstances in which Title IX or the regulations permit different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than <i>de minimis</i> harm, unless otherwise permitted by Title IX or the regulations • Proposed § 106.31(a)(2) would further clarify that adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity subjects a person to more than <i>de minimis</i> harm on the basis of sex. 	<p>None</p>
<p>§ 106.41(b)(2) - Athletics</p> <ul style="list-style-type: none"> • None (at this time) 	<p>Current § 106.41(a) establishes that “[n]o person shall, on the basis of sex, be . . . treated differently from another person . . . in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”</p>

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	However, § 106.41(b) authorizes a recipient to offer male and female athletic teams when selection for such teams is based upon competitive skill or the activity involved is a contact sport. This regulation also requires a recipient that operates or sponsors a sports team for members of only one sex to allow members of the excluded sex to try out for the team unless the sport involved is a contact sport.
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Rationale for NPRM Changes

§ 106.10 - Scope

- ED proposes adding § 106.10 to clarify Title IX’s coverage of specific forms of sex discrimination, including some that are already addressed in the current regulations, such as discrimination based on pregnancy or related conditions, and others that are consistent with decisions of Federal courts and ED’s identification of sex-based barriers to equal educational opportunity.
- The specific categories of discrimination listed in proposed § 106.10 are not to be considered exhaustive.

§ 106.31(a)(2) - Education Programs or Activities

- ED suggests that subjecting students to differential treatment on the basis of sex in the education context is presumptively harmful, including where the differential treatment is based upon and thus perpetuates “overbroad generalizations about the different talents, capacities, or preference of the sexes.”
- ED notes that not all sex-based distinction or separation amounts to prohibited discrimination, in particular where it imposes no harm or *de minimis* harm.
- ED also noted that TIX or its regulations permit recipients to separate students on the basis of sex, even where doing so causes some individual students more than *de minimis* harm. Accordingly, this rule would not apply in contexts in which a particular practice is otherwise permitted by Title IX, such as admissions practices of traditionally single-sex postsecondary institutions or when permitted by a religious exemption.
- ED’s current view is that regardless of whether some students might experience more than *de minimis* harm if excluded from a sex-separate living facility, Congress has permitted that exclusion.

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§ 106.41(b)(2) - Athletics

- ED plans to issue a separate NPRM to address whether and how it should amend § 106.41 in the context of sex-separate athletics.
- Specifically, ED plans to address the question or what criteria, if any, recipients should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team.

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